

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

**JORGE RUBIO V. STATE OF TENNESSEE, CHERRY LINDAMOOD,
WARDEN**

**Appeal from the Criminal Court for Davidson County
No. 14341 Jim T. Hamilton, Judge**

No. M2008-00048-CCA-R3-HC - Filed July 18, 2008

This matter is before the Court upon the State's motion to dismiss or in the alternative to affirm the judgment of the trial court by memorandum opinion pursuant to Rule 20, Rules of the Court of Criminal Appeals. Petitioner, Jorge A. Rubio, has appealed the trial court's order dismissing his petition for writ of habeas corpus in which Petitioner alleged that he is being illegally restrained because the indictment was defective and there was a fatal variance between the indictment and the evidence produced at trial. Upon a review of the record in this case, we are persuaded that the trial court was correct in dismissing the petition for habeas corpus relief and that this case meets the criteria for affirmance pursuant to Rule 20, Rules of the Court of Criminal Appeals. Accordingly, the State's motion is granted, and the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES, and ROBERT W. WEDEMEYER, JJ., joined.

Jorge A. Rubio, Pro Se, Clifton, Tennessee.

Robert E. Cooper Jr., Attorney General & Reporter; Lacy Wilber, Assistant Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

In 1986, Petitioner was convicted of first degree murder and sentenced to life imprisonment. *See State v. Rubio*, 746 S.W.2d 732 (Tenn. Crim. App. 1987). He appealed to this Court arguing that the trial court erred in overruling defense counsel's motion to be relieved from representation. *Id.* Petitioner's conviction was affirmed. *Id.* at 737. Subsequently, Petitioner sought post-conviction relief on the basis of ineffective assistance of counsel. *See Jorge Rubio v. State*, No. 01C01-

9102CC00062, 1991 WL 261843, at *1 (Tenn. Crim. App., at Nashville, Dec. 13, 1991), *perm. app. denied* (Tenn. Mar. 30, 1992). This Court denied post-conviction relief. *Id.* at *4. Then, in October of 2004, Petitioner sought habeas corpus relief. *See Jorge Acosta Rubio v. Tony Parker, Warden*, No. W2004-02850-CCA-R3-HC, 2005 WL 1707982, at *1 (Tenn. Crim. App., at Jackson, July 22, 2005), *perm. app. denied* (Tenn. Dec. 5, 2005). In that petition, Petitioner argued that: (1) the sentencing court did not have jurisdiction to pass judgment due to the duplicity of the indictment; (2) the indictment failed to vest jurisdiction in the trial court; (3) the judgment is void due to the ambiguity pertaining to the Class X law; (4) he was entitled to immediate release due to the court's failure to instruct the jury on the essential mental elements of homicide and/or intent to kill; and (5) due to the cumulative defects in the foundation and structure of his sentence, he is being illegally restrained of his liberty. *Id.* The trial court denied habeas corpus relief. On appeal, this Court determined that none of Petitioner's arguments had merit. Specifically, as to the validity of the indictment, this Court determined that "the indictment sufficiently conveyed the crime with which the Petitioner was charged." *Id.* at *3.

Subsequently, on September 28, 2007, Petitioner filed another petition for habeas corpus relief. In that petition, he argued that his indictment was void for failure to state an offense, that there was a fatal variance between the indictment and the evidence at trial. The trial court dismissed the petition. On appeal, Petitioner asserts that the trial court improperly dismissed the petition.

Analysis

The determination of whether to grant habeas corpus relief is a question of law. *See Hickman v. State*, 153 S.W.3d 16, 19 (Tenn. 2004). As such, we will review the habeas corpus court's findings de novo without a presumption of correctness. *Id.* Moreover, it is the petitioner's burden to demonstrate, by a preponderance of the evidence, "that the sentence is void or that the confinement is illegal." *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000).

Article I, section 15 of the Tennessee Constitution guarantees an accused the right to seek habeas corpus relief. *See Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). A writ of habeas corpus is available only when it appears on the face of the judgment or the record that the convicting court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993); *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). In other words, habeas corpus relief may be sought only when the judgment is void, not merely voidable. *See Taylor*, 995 S.W.2d at 83. "A void judgment 'is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant's sentence has expired.' We have recognized that a sentence imposed in direct contravention of a statute, for example, is void and illegal." *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000) (quoting *Taylor*, 995 S.W.2d at 83).

However, if after a review of the habeas petitioner's filings the habeas corpus court determines that the petitioner would not be entitled to relief, then the petition may be summarily dismissed. T.C.A. § 29-21-109; *State ex rel. Byrd v. Bomar*, 381 S.W.2d 280 (Tenn. 1964). Further,

a habeas corpus court may summarily dismiss a petition for writ of habeas corpus without the appointment of a lawyer and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions addressed therein are void. *Passarella v. State*, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994), *superceded by statute as stated in State v. Steven S. Newman*, No. 02C01-9707-CC-00266, 1998 WL 104492, at *1 n.2 (Tenn. Crim. App., at Jackson, Mar. 11, 1998).

The procedural requirements for habeas corpus relief are mandatory and must be scrupulously followed. *Summers v. State*, 212 S.W.3d 251, 260 (Tenn. 2007); *Hickman*, 153 S.W.3d at 19-20; *Archer*, 851 S.W.2d at 165. A habeas corpus court “properly may choose to summarily dismiss a petition for failing to comply with the statutory procedural requirements.” *Summers*, 212 S.W.3d at 260; *See also Hickman*, 153 S.W.3d at 21.

The trial court herein properly dismissed the petition for habeas corpus relief. This Court has already determined that the indictment in Petitioner’s case was sufficient. *See Jorge Acosta Rubio*, 2005 WL 1707982, at *3. The “law of the case” doctrine provides that “issues previously litigated and decided by a court of competent jurisdiction ordinarily need not be revisited.” *State v. Jefferson*, 31 S.W.3d 558, 561 (Tenn. 2000) (citing *Memphis Publ’g Co. v. Tennessee Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998)). Furthermore, Petitioner’s claim that there is a fatal variance between the indictment and the evidence presented at trial is not a cognizable claim for habeas corpus relief. This is “simply a different form of challenge to the validity of the indictment.” *Eric D. Wallace v. Stephen Dotson, Warden*, No. W2006-00908-CCA-R3-HC, 2007 WL 852173, at *2 (Tenn. Crim. App., at Jackson, Mar. 22, 2007), *perm. app. denied* (Tenn. Aug. 13, 2007) (citing *William T. Yelton v. Robert Waller, Warden*, No. M2004-02529-CCA-R3-HC, 2006 WL 119628, at *1 (Tenn. Crim. App., at Nashville, Jan. 17, 2006); *Stephen Lajuan Beasley v. State*, No. E2005-00367-CCA-MR3-HC, 2005 WL 3533265, at *4 (Tenn. Crim. App., at Knoxville, Dec. 27, 2005), *perm. app. denied* (Tenn. May 30, 2006); *Byron Edwards v. State*, No. E2004-00918-CCA-R3-HC, 2004 WL 2951975, at *2 (Tenn. Crim. App., at Knoxville, Dec. 20, 2004), *perm. app. denied* (Tenn. Mar. 21, 2005)). This issue is without merit.

Rule 20, Rules of the Court of Criminal Appeals provides inter alia:

The Court, with the concurrence of all judges participating in the case, when an opinion would have no precedential value, may affirm the judgment or action of the trial court by memorandum opinion rather than by formal opinion, when:

The judgment is rendered or the action taken in a proceeding before the trial judge without a jury, and such judgment or action is not a determination of guilt, and the evidence does not preponderate against the finding of the trial judge

We determine that this case meets the criteria of the above-quoted rule and, therefore, we grant the State's motion filed under Rule 20. We affirm the judgment of the trial court.

JERRY L. SMITH, JUDGE